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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-983

JOSEPH A. MALONEY, d/b/a
THE APALACHICOLA TIMES,
Petitioner,

versus

B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENTS

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B. ROY GIBSON, JR., and ST. JOSEPH TELEPHONE AND TELEGRAPH COMPANY, a corporation under the laws of Florida,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondents, B. Roy Gibson, Jr. and St. Joseph Telephone and Telegraph Company, file this Brief in opposition to the Petition of Joseph A. Maloney, d/b/a The Apalachicola Times, seeking a writ of certiorari to the Supreme Court of Florida and the District Court of Appeal of Florida, First District, for review of the judgment and opinion of the District Court of Appeal entered on June 4, 1974.

REPORTS OF OPINIONS DELIVERED IN COURTS BELOW

Gibson v. Maloney, 214 So.2d 89 (1st D.C.A. Fla. 1967).

Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), *cert. denied*, 398 U.S. 951 (1970).

Gibson v. Maloney, 263 So.2d 632 (1st D.C.A. Fla. 1972), *cert. denied*, 410 U.S. 984 (1973).

Maloney v. Gibson, 295 So.2d 120, (1st D.C.A. Fla. 1974), *cert. denied*, ____ So.2d ____ (Fla. Nov. 13, 1974).

JURISDICTION

The Petitioner has attempted to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1257(3) and Rule 19(1)(a), Supreme Court Rules. The Respondents submit that the decision of the District Court of Appeal of Florida clearly does not decide a federal question of substance in any way not in accord with applicable decisions of this Court. Therefore, this Court should decline jurisdiction and deny certiorari.

STATEMENT OF THE CASE

Respondents would supplement the Petitioner's Statement of the Case to include the fact that this Court denied a petition for a writ of certiorari by the Petitioner following the action by the Florida Supreme Court in *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970); this Court's order is reported at 398 U.S. 951.

QUESTIONS PRESENTED

The Respondents do not agree that the questions presented in the Petition are properly before this Court. The Respondents submit that the two questions presented by the Petitioner should be answered in the following manner:

ONE:

The opinion of the District Court of Appeal of Florida, First District, does not decide a substantial federal question in a way not in accord with the applicable current decisions of this Court.

TWO:

The opinion of the District Court of Appeal of Florida, First District, does not misinterpret and misapply the decisions of this Court in *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___U.S. ___, 95 S.Ct. 465 (1974), so as to deny Petitioner's rights under the First, Fourteenth, and Seventh Amendments of the Constitution of the United States.

SUMMARY OF ARGUMENT

I

Because all issues in the Petition have been previously presented to this Court in earlier

petitions by the Petitioner, they have been forever settled as law of this case and are no longer grounds for review.

II

This case does not conflict with *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974). *Gertz* concerns only the liability for defamation of a "private individual." This case involves the privilege against liability for defamation of a "public figure."

III

This case does not conflict with *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974). The state courts in this case have found no proof of "actual malice" which the Petitioner, as a public figure, must prove to recover for defamation. *Cantrell* does not alter the Court's definition of "actual malice," which has been assiduously applied by the state courts in this case.

IV

The Petitioner has not been denied his right to a jury trial under the Seventh Amendment of the Constitution of the United States because that amendment has not been incorporated into the Fourteenth Amendment to apply to the state courts.

REASONS FOR DENYING THE WRIT

The District Court of Appeal of Florida, First District, did not misinterpret or misapply the decisions of *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974).

I

Because All Issues In The Petition Have Been Previously Presented To This Court In Earlier Petitions By The Petitioner, They Have Been Forever Settled As Law Of This Case And Are No Longer Grounds For Review.

Because the most recent actions by the District Court of Appeal of Florida and the Supreme Court of Florida resulted in a per curiam affirmance in favor of the Respondents and a denial of the Petitioner's petition for a writ of certiorari respectively, it is necessary to refer to the text of the earlier opinions rendered in this case by those courts in *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), and *Gibson v. Maloney*, 263 So.2d 623 (1st D.C.A. Fla. 1972). The per curiam decision of the District Court of Appeal of Florida that is presently in issue specifically states. "Affirmed on authority of Gibson v. Maloney, 231 So.2d 823 (Fla. 1970), Gibson v. Maloney, 263 So.2d 632 (Fla. App. 1972), cert. den. 410 U.S. 984." Maloney v. Gibson 295 So.2d 120 (1st D.C.A. Fla. 1974). Both of those decisions were presented for this Court's review in the Petitioner's other petitions to this Court for a

writ of certiorari in 1970 (Case No. 69-1501; 398 U.S. 951) and in 1973 (Case No. 72-1065; 410 U.S. 984), and this Court denied certiorari in each instance. It is submitted that the only issues presented now by the Petitioner were in fact previously the subjects of review by this Court on those two occasions. Consequently, these issues have been forever foreclosed to the Petitioner as law of the case.

II

This Case Does Not Conflict With *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974). *Gertz* Concerns Only The Liability For Defamation Of A "Private Individual." This Case Involves The Privilege Against Liability For Defamation Of A "Public Figure."

The Respondents submit that the present case is not affected by this Court's holding in *Gertz v. Robert Welch*, supra. This case involves the application of the constitutional privilege of free speech established by this Court in *Curtis Publishing Co. v. Butts, Associated Press v. Walker*, 388 U.S. 130, 87 S.Ct. 1975 (1967). In *Butts*, this Court expanded the privilege first enunciated by it in *New York Times v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964), to include speech that concerns "public figures" who have been ". . . involved in issues in which the public has a justified and important interest." *Curtis Publishing Co. v. Butts*, 388 U.S. at 134, 87 S.Ct. at 1980. This privilege can only be overcome by clear and convincing evidence that the tortfeasor acted with "actual malice," which this Court has defined as having knowledge of the falsity

of the speech or having acted with reckless disregard of its truth or falsity.

A plurality decision of this Court in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971), subsequently extended the *New York Times* privilege to preclude recovery by a *private individual* for defamation relating to his involvement in matters of general or public interest, absent a showing of actual malice. However, in *Gertz v. Robert Welch, Inc.*, supra, this Court receded from the holding in *Rosenbloom* and withdrew the privilege from situations involving private individuals. This Court's decision in *Gertz* was clear and precise, beginning with its statement of the issue for its consideration:

> "The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual *who is neither a public official nor a public figure* may claim a constitutional privilege against liability for the injury inflicted by those statements." Gertz v. Robert Welch, Inc., 94 S.Ct. at 3003.

and culminating in its holding:

> "We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a *private individual*." *Id.* at 3010. (emphasis supplied).

At no point in *Gertz* did this Court alter the privilege against liability because of defamation of a *public figure*. It pointed out that the public figure, unlike the private individual, usually possessed access to the means of communication to rebut the defamation by use of self-help. The Court in *Gertz* provided ample guidance as to the appellation of "public figure:"

> ". . . For the most part those who attain this status [public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.
>
> ". . . [T]he communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." *Id.* at 3009-3010.

Examination of the present case reveals that the Florida courts have long held the Petitioner to be a "public figure" and that the alleged defamation concerned only his voluntary participation as a public figure in a public controversy.

In its earlier opinion of *Gibson v. Maloney*, 231 So.2d 823 (Fla. 1970), the Florida Supreme Court held that the Petitioner was indeed a "Public figure" and that the alleged defamation concerned his activities in that capacity:

> ". . . There can be little doubt that Maloney entered the area and established the anti-duPont editorial policy of his Apalachicola Times, for the purpose of arousing public indignation against these interests, *and by virtue of that made himself a public figure engaged in a public enterprise and for the purpose, among other things, of influencing public opinion.* He became part of the passing scene and therefore subject to fair comment." *Id.* at 824 (emphasis supplied).

At this point, compare with the guidance of *Gertz* the reasons for the Florida Supreme Court's holding that the Petitioner was in fact a "public figure." It found that the Petitioner had in his newspaper editorials created a public controversy over the economic impact of the duPont [Respondents] interests in the area. This clearly squares with the definition of *Gertz* that a public figure is one who has voluntarily thrust himself ". . . to the forefront of particular public controversies . . .," and there is no doubt that the comments of Respondent Gibson concerned only the activities of the Petitioner in his role as a public figure. The Florida Supreme Court declared that

> ". . . It was therefore fitting and proper that at such a public meeting [Rotary Club] the

> failure of a segment of the community to grow and the apparent reason for it not growing [the editorial activities of Petitioner] should be freely discussed. Therefore, under the command of the *Abrams*, *Jacova*, and *Sullivan* cases, the comment made by Gibson was 'fair comment' on a public matter relating in part to an individual who had by choice made himself newsworthy and part of the passing scene." Gibson v. Maloney, 231 So.2d 823 at 826 (Fla. 1970).

The Florida Supreme Court then remanded this case for retrial in which instructions under *New York Times* were to be given. However at the trial, the trial judge's instructions permitted the jury to consider whether or not the Petitioner was a "public figure," notwithstanding the Florida Supreme Court's clear determination of that issue of fact. The Respondents took appeal to the District Court of Appeal of Florida where they argued that the issue of whether the Petitioner was a "public figure" had been foreclosed from further consideration by the Florida Supreme Court:

> "Appellants contend that the Supreme Court's ruling on the 'public figure' question became the law of the case, and therefore it was error to permit that question to be decided by the jury on retrial. We agree. Under the instruction as given the jury was not required to find that plaintiff was a public figure. Indeed, as worded, the instruction enabled the jury to find that plaintiff was not a public figure, a

finding which if made would run counter to the holding of the Supreme Court.

"Insofar as the public figure question is concerned, the same facts were adduced on retrial as were before the Supreme Court when it made the decision that plaintiff was a 'public figure.' . . .

. . . .

"*Having concluded as we do, that the plaintiff is a public figure,* and that the jury should have been so instructed, the criticality of the trial court's failure to do so became apparent . . . *For this reason alone, the judgment reviewed herein must be reversed.*" Gibson v. Maloney, 263 So.2d 632 at 635 (Fla. 1972) (emphasis supplied)

Therefore, the basis of the Florida courts' result in this case was not, as the Petitioner has nevertheless asserted in his brief, *Rosenbloom v. Metromedia, Inc.*, supra; it was clearly predicated upon the finding that the Petitioner was a *public figure*, because of his editorial activities in his newspaper, The Apalachicola Times.

The Respondents feel compelled to point out to the Court that the issue of whether the Petitioner was in fact a "public figure," as the Supreme Court of Florida held in 1970, has been available for review by this Court on *two* occasions, in Case Number 69-1501 in

1970 and in Case Number 72-1065 in 1973. In both instances. this Court denied the Petitioner's petition for a writ of certiorari. Maloney v. Gibson, 398 U.S. 951 (1970); Maloney v. Gibson, 410 U.S. 984 (1973). It is. therfore, particularly inappropriate for the Petitioner to now attempt to again raise it as an issue for review.

Of perhaps unique significance is the fact that the alleged defamation in this case concerned the Petitioner's activities as owner and editor of the local newspaper. There are certainly few persons with greater ability to remedy by self-help their injury from defamation than an owner and editor of a newspaper — such as the Petitioner was. This Court pointed out in *Gertz* that public figures were usually persons who enjoyed free and ready access to the channels of communication and were able to thereby rebut false statements. This has been a constant factor in this Court's consideration of the "public figure" privilege. The Court will recall that in *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975 (1967), it found great significance in the fact that the plaintiffs, both of whom were held to be "public figures," "... commanded sufficient public interest and had sufficient access to the means of counter-argument ..." to alleviate their injuries. *Id.* at 155, 87 S.Ct. at 1991. It can hardly be gainsaid that a man who owns and operates his own newspaper as did the Petitioner has any less access to the means of rebuttal than a college football coach such as Wally Butts.

III

This Case Does Not Conflict With *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___ 95 S.Ct. 465 (1974). The State Courts In This Case Have Found No Proof Of "Actual Malice" Which The Petitioner, As A Public Figure, Must Prove In Order To Recover For Defamation. *Cantrell* Does Not Alter The Court's Definition Of "Actual Malice," Which Has Been Assiduously Applied By The State Courts In This Case.

The Petitioner has also claimed that the decisions in this case are in conflict with this Court's recent decision in *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974).

The respondents' immediate and initial response is that *Cantrell* was decided by this Court on December 18, 1974. The Supreme Court of Florida denied the Petitioner's petition for writ of certiorari on November 13, 1974. There is certainly no directive in *Cantrell* that it is to be applied retrospectively.

However, *Cantrell* wrought no change in the law applicable to this case. *Cantrell* involves the "false-light" theory of the tort of invasion of privacy. This case has always involved the tort of defamation. The Petitioner has apparently cited *Cantrell* for authority upon the issue of "actual malice," proof of which would be necessary to overcome the public figure privilege against liability for defamation.

Quite simply in *Cantrell*, the trial judge had dismissed the plaintiffs' claim for punitive damages because there was no evidence that the invasion of privacy ". . . was done maliciously within the legal definition of that term." *Id.* at 469. He then went on to charge the jury that it could find liability for compensatory damages if it found that the publications had ". . . been made with knowledge of their falsity or in reckless disregard of the truth." *Id.* The appellate court felt that these actions created an anomaly: that the "malice" that the trial judge found lacking for punitive damages also had to result in an absence of "actual malice" required to overcome the constitutional privilege for awarding compensatory damages. Therefore, it held that the trial judge should have granted a directed verdict for the defendants.

However, this Court carefully explained that there is a distinction between "actual malice" in libel actions and common law malice required for award of punitive damages:

> ". . . As so defined, of course, 'actual malice' is a term of art, created to provide a convenient shorthand for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers. As such, it is quite different from the common-law standard of 'malice' generally required under state tort law to support an award of punitive damages. In a false-light case, common-law malice — frequently ex-

> pressed in terms of either personal ill will toward the plaintiff or reckless or wanton disregard of the plaintiff's rights — would focus on the defendant's attitude toward the defendant's privacy, not towards the truth or falsity of the materials published." *Id.* at 470.

As a final result, this Court reconciled the actions of the trial judge. It held that although the trial judge found no evidence of *common-law malice* toward the plaintiffs to support a claim of punitive damages, the jury was not thereby automatically precluded from finding evidence of "knowing falsity or reckless disregard of the truth" so to award compensatory damages. This court in *Cantrell* did not in any way alter the privilege applicable to public figures in libel cases, nor did it diminish the definition of "actual malice" which must be proved to overcome that privilege.

In his petition, the Petitioner claims that because two juries in the past have awarded him punitive damages, this Court should infer that the juries also found actual malice. This contention runs afoul the very case cited by the Petitioner for conflict, *Cantrell v. Forest City Publishing Co.*, supra, in which this Court explained that the common law malice traditionally required for awarding punitive damages is not synonymous with "actual malice" required in libel cases under the *New York Times* doctrine. *See*, Cantrell v. Forest City Publishing Co., ___ U.S. ___, 95 S.Ct. 465 at 470 (1974).

The Petitioner in his petition at page eleven also alleges that two juries have found actual malice in this case. This allegation by the Petition is not correct. In the first trial, the trial court refused to give instructions reflecting the principles of *New York Times v. Sullivan*. *See*, Gibson v. Maloney, 231 So.2d 823 at 824 (Fla. 1970). In the trial which resulted in the second jury verdict, the trial judge failed to instruct the jury that the Petitioner was in fact a public figure as the Supreme Court of Florida had previously determined as law of the case. That jury was then able to find liability without any proof of actual malice. When the Respondents appealed the second jury verdict to the District Court of Appeal of Florida, that court made an independent review of the sufficiency of the evidence to support a finding of actual malice and held:

> "We cannot find based on our independent analysis of the record, that the proofs considered either singularily or cumulatively satisfy the constitutional standard with the convincing clarity necessary to support a judgment that the defamatory statements about which appellee complained were published with knowledge that they were false or with reckless disregard of whether they were false or not." Gibson v. Maloney, 263 So.2d 632 (1st D.C.A. Fla. 1972).

This independent review of the record conducted by the Florida court for sufficient proof of actual malice was in accordance with, and was indeed mandated by, this Court's succession of decisions in *New York*

Times v. Sullivan, supra; *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323 (1968); and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811 (1971).

The Petitioner has also attempted in his petition to find significance in the statement by the District Court of Appeals in its 1972 decision that the allegedly defamatory statement by Respondent Gibson was ". . . erroneous, inaccurate and negligently made." Gibson v. Maloney, 263 So.2d 632 at 637 (1st D.C.A. Fla. 1972). However, the Petitioner has failed to realize that that court then immediately proceeded to point out that mere negligence will not suffice to meet the burden of proving "actual malice." That action was in strict adherence with this Court's guidance in *New York Times v. Sullivan*, 376 U.S. 290, 84 S.Ct. 710 (1964), when it stated

> "We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." *Id.* at 287-288, 84 S.Ct. at 730.

Again, the Respondents must point out that the issue of whether the Petitioner has proved the existence of "actual malice" was available for review at his most recent unsuccessful petition to this Court for a writ of certiorari in 1973 (Case Number 72-1065, 410 U.S. 984).

IV

The Petitioner Has Not Been Denied His Right To A Jury Trial Under The Seventh Amendment Of The Constitution Of The United States Because That Amendment Has Not Been Incorporated Into The Fourteenth Amendment To Apply To The State Courts.

Again the Petitioner has claimed that the decisions of the Florida courts have denied him his rights under the Seventh Amendment of the Constitution of the United States for a jury trial. The District Court of Appeal of Florida in its *1972* opinion directed the trial court to enter judgment in favor of the Respondents. That action came after three trials of this case, and again the Respondents must point out that this issue was raised in Petitioner's previous petition to this Court in 1973. Nonetheless, Respondents submit that Petitioner's claim under the Seventh Amendment has no bearing on this case because the Seventh Amendment's provision for jury trial has not been incorporated by the Fourteenth Amendment so to apply to state trials:

> "A denial of trial by jury in a state court is not a denial of due process of law under the Fourteenth Amendment. 'The Fourteenth Amendment neither implies that all trials must be by jury nor guarantees any particular form or method of state procedure.' Hardware Dealers' Mutual Insurance Company of Wisconsin v. Glidden Co., 284 U.S. 151, 52 S.Ct.

69, 71, 76 L.Ed. 214." Olesen v. Trust Co. of Chicago, 245 F.2d 522, 524 (7th Cir. 1957), cert. den. 255 U.S. 896, 78 S.Ct. 70 (1957).

The actions by the Florida courts in this case are exactly the same as the final action taken by this Court in *New York Times v. Sullivan*, supra. If a review of all of the evidence reveals absolutely no basis in fact to constitutionally support a judgment for a plaintiff, then considerations of "effective judicial administration" require that the courts direct the trial court to enter a judgment in favor of the defendants. *See*, New York Times v. Sullivan, 376 U.S. 254 at 284-285, 84 S.Ct. at 728 (1964).

CONCLUSION

The Court should decline on jurisdictional grounds to issue the Writ of Certiorari in this case. Prior decisions of this Court have been correctly interpreted and applied in this case, and the two cases cited by the Petitioner for conflict, *Gertz v. Robert Welch, Inc.*, ___ U.S. ___, 94 S.Ct. 2997 (1974), and *Cantrell v. Forest City Publishing Co.*, ___ U.S. ___, 95 S.Ct. 465 (1974), have no application to the facts presented by this case. Most significantly, the issue presented by Petitioner of whether he was in fact a "public figure" has been presented to this Court for review on two prior occasions. The Petitioner's other issue, whether the Respondents acted with "actual malice," was presented for this Court's review in the Petitioner's

1973 petition. The Respondents submit to this Court that these issues have already been resolved for all time.

Respectfully submitted

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RESPONDENTS

CERTIFICATE OF SERVICE

I, CHARLES S. ISLER, JR., a member of the Bar of the Supreme Court of the United States, hereby certify that three true copies of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari were served on Petitioner by mailing copies thereof in duly addressed envelope to J. Ben Watkins of Watkins, Hill & Marts, Post Office Drawer 1814, Tallahassee, Florida 32302, Attorneys for Petitioner, this ____ day of March, 1975.

CHARLES S. ISLER, JR.